UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	**)**	
	)	
Zaclon, Incorporated,	**)**	
Zaclon LLC, and	**)**	**Docket No. RCRA-05-2004-0019**
Independence Land Development Company,	**)**	
	)	
Respondents	**)**	

ORDER ON COMPLAINANT'S MOTION FOR ACCELERATED DECISION ON LIABILITY

I. Background

This matter was initiated on September 29, 2005, by Complainant, the United States Environmental Protection Agency Region 2, filing a Complaint charging Respondent, Zaclon, Incorporated, with one count of violating the Resource Conservation and Recovery Act (RCRA), as amended, 42 U.S.C. §§ 6901 *et seq.* Specifically, that Count alleges that Zaclon, Incorporated owns and operates a facility at which hazardous wastes, specifically, sash and baghouse dust, were stored without a permit or interim status for at least six years prior to Agency sampling on September 19, 2002, in violation of Section 3005(a) of RCRA, 42 U.S.C. § 6925(a), and the state regulations implementing this provision, Ohio Administrative Code 3745-50-45.

An Answer to the Complaint was filed on November 2, 2004, denying the alleged violation. By Order dated May 26, 2005, the parties were requested to file their prehearing exchanges, and on July 21, 2005, the prehearing exchange process was completed. By Order dated October 7, 2005, Complainant was granted leave to amend the Complaint to add Zaclon LLC and Independence Land Development Company ("ILDC") as additional Respondents.[1] Complainant was also granted in that Order leave to file a Second Amended Complaint, based on information Complainant received after the Prehearing Exchange from an inspection of Respondents' facility, charging Respondents with a second violation, Count 2, alleging that Respondents illegally receive, store and treat hazardous waste, namely spent stripping acid, in

[1] Zaclon, Incorporated, Zaclon LLC, and ILDC are hereinafter collectively referred to as "Respondents" or "Zaclon."

violation of RCRA. The Second Amended Complaint was filed on October 14, 2005.

On August 19, 2005, Complainant filed a Motion for Accelerated Decision on Liability and Memorandum in Support (Motion), asserting that there are no genuine issues of material fact as to Count 1, and that upon the arguments of both parties addressing the inferences and legal conclusions each party would draw, Complainant is entitled to judgment as a matter of law as to Count 1. On September 6, 2005, Respondents requested a short extension of time to file their response to the Motion, indicating therein that counsel for Complainant did not oppose the request.[2] On September 8, 2005, Respondents submitted their Memorandum in Opposition to Complainant's Motion (Opposition).

II. Standard for Accelerated Decision

The Rules of Practice, 40 C.F.R. Part 22, provide at section 22.20(a) that -

> The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

Accelerated decision is similar to summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure (FRCP), and therefore case law thereunder is appropriate guidance as to accelerated decision. *CWM Chemical Services, Inc.*, 6 E.A.D. 1, 12 (EAB 1995); *Mayaguez Regional Sewage Treatment Plant* 4 E.A.D. 772, 780-82, (EAB 1993), *aff'd sub nom., Puerto Rico Aqueduct and Sewer Authority v. EPA,* 35 F.3d 600, 606 (1st Cir. 1994), *cert. denied,* 513 U.S. 1148 (1995).

First it must be determined whether, under FRCP 56(c), the movant has met its initial burden of showing that there exists no genuine issue of material fact by identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show[ing] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)(quoting FRCP 56(c)). For the EPA to prevail on a motion for accelerated decision on liability, it must present "'evidence that is so strong and persuasive that no reasonable [factfinder] is free to disregard it'" [and] "'must show that it has established the critical elements of [statutory] liability and that [the respondent] has failed to raise a genuine issue of material fact on its affirmative defense . . . .' " *Rogers Corporation v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002) quoting *BWX Technologies, Inc.*, RCRA (3008) Appeal No. 97-5,

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[2] The Respondents' Motion for Extension of Time to File Memorandum in Opposition is hereby **GRANTED**.

2000 EPA App. LEXIS 13 at *38-39, 43 (EAB, April 5, 2000). "Evidence not too lacking in probative value must be viewed in the light most favorable to the party opposing the motion." *Rogers*, 275 F.3d at 1103. Inferences may be drawn from the evidence if they are "reasonably probable." *Id.* "Summary judgment is inappropriate when contradictory inferences can be drawn from the evidence." *Id.*

The EPA initially must "show that there is an absence of support in the record for the [affirmative] defense." *Id.*, quoting *BMX* at *44. If the EPA makes this showing, then the respondent "as the non-movant bearing the ultimate burden of persuasion on its affirmative defense, must meet its countervailing burden of production by identifying 'specific facts' from which a reasonable factfinder could find in its favor by a preponderance of the evidence." *Id.*

Well settled case law on FRCP 56 states that the non-movant must designate specific facts showing that there is a genuine issue for trial by presenting affidavits, depositions, answers to interrogatories, admissions on file, or other evidence. *Celotex*, 477 U.S. at 324. The motion for summary judgment places the non-movant on notice that all arguments and evidence opposing the motion, including affirmative defenses, must be properly presented and supported. *Pantry, Inc. v. Stop-N-Go Foods, Inc.*, 796 F. Supp. 1164 (S.D. Ind. 1992). To avoid the summary judgment motion being granted, the non-movant must provide "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). An Opposition to summary judgment is not sufficient if the nonmoving party's evidence is "merely colorable" or "not significantly probative." *Id.* at 249-250. Summary disposition may not be avoided merely by alleging that a factual dispute may exist, or that future proceedings may turn something up. *Green Thumb Nursery, Inc.*, 6 E.A.D. 782 n. 23 (EAB 1997); *Radobenko v. Automated Equipment Corp.*, 520 F.2d 540, 543 (9th Cir. 1978). It has been held that an issue of fact may not be raised by merely referring to proposed testimony of witnesses. *King v. National Industries, Inc.*, 512 F.2d 29, 33-34 (6th Cir. 1975)(affidavit saying what the attorney believes or intends to prove at trial is insufficient to comply with the burden placed on a party opposing a motion for summary judgment under FRCP 56); *Ricker v. American Zinser Corp.*, 506 F. Supp. 1, 2 (E.D. Tenn. 1978)(affidavit of counsel containing ultimate facts and conclusions, referring to proposed testimony and stating what the attorney intends to prove at trial, is insufficient to show that there is a genuine issue for trial), *aff'd, sub nom. Ricker v. Zinser Testilmaschinen GmbH*, 633 F.2d 218 (6th Cir. 1980).

III. Arguments of the Parties

The parties agree that Zaclon purchased sash, which is a mixture of zinc skimmings and ash from zinc melting kettles in the galvanizing process, and that it is a secondary source of zinc for use in a manufacturing process. The parties also agree that Zaclon purchased baghouse dust from an off-site source for use as a secondary source of zinc for use in a manufacturing process.

Complainant alleges that the sash, the material on the sash pad at Respondents' facility, is a "by-product" as defined by 40 C.F.R. § 261.1(c)(3): "a material that is not one of the primary

products of a production process and is not solely or separately produced by the production process. Examples are process residues such as slags." Complainant asserts that the baghouse dusts are sludges as defined by 40 C.F.R. § 260.10: "any solid, semi-solid or liquid waste generated from a municipal, commercial or industrial waste water treatment plant . . . or air pollution control facility." The Complaint, and as amended by the Second Amended Complaint,[3] alleges that samples of the sash and baghouse dust were taken on September 19, 2002, after an inspection of Zaclon's facility on August 22, 2001, and that they exhibited toxicity characteristics for lead and cadmium, which are characteristics of hazardous waste.

The Federal regulations at 40 C.F.R. § 261.2(c) provide that sludges and by-products that are recycled are nevertheless "solid wastes" if they are "used in a manner constituting disposal" or "accumulated speculatively." The regulations at 40 C.F.R. § 261.1(c)(8) provide that a material is *not* "accumulated speculatively" if it is shown that the material is potentially recyclable, has a feasible means of being recycled, and during the year the amount of material that is recycled or transferred off site for recycling is at least 75 percent of the amount of material accumulated at the beginning of the year. Such material must be "of the same type" and "recycled in the same way." 40 C.F.R. § 261.1(c)(8).

The Complaint alleges that Respondents accumulated speculatively the sash and baghouse dust for at least 6 years prior to the September 19, 2002 sampling event. The Complaint alleges further that the sash was stored outdoors in an open pile, and the baghouse dust was stored outdoors on a ledge in torn bags, and these materials were stored in such a manner that the material could escape into the environment, and thus were placed on land in a manner that constitutes disposal, for at least 6 years before the inspection. Complainant therefore alleges that they are "solid wastes" under 40 C.F.R. § 261.2(c)(1)(A) and "hazardous wastes," having lead and cadmium toxicity characteristics, and that they were stored at the facility without a permit or interim status.

Zaclon in its Answer denies that the sash and baghouse dust were "stored" and asserts that they were "staged for recycling" at the facility. Respondents claim that Zaclon recycled annually more that 75 percent of a *combination* of the sash and baghouse dust, taken together with two other materials Zaclon recycles, namely stripping acid and preflux. That is, at least 75 percent of the combined amount of these four materials accumulated at the beginning of the year is recycled. Respondents refer to EPA's discussion in the preamble to the January 4, 1985 Final Rule interpreting the phrase in 40 C.F.R. § 261.1(b)(8) "material of the same type" as "materials of the same type generated from the same process." Respondents assert that sash, baghouse dust, stripping acid and spent preflux are all primary raw materials generated in the same galvanizing process, and are thus the "same type," and are recycled by Zaclon in the same way, for manufacture of zinc ammonium chloride galvanizing fluxes. Zaclon contends in its Answer that in calculating the turnover rate, the 75 percent requirement "is to be applied to the combined turnovers and inventories of sash, baghouse dust, stripping acid and spent preflux," that "[u]sing

[3]Hereinafter the word "Complaint" refers to both the original Complaint and the Second Amended Complaint, which do not differ significantly as to Count 1.

this calculation, the 75% requirement is met," and therefore the material was not "accumulated speculatively."

In its Prehearing Exchange statement (at 7), Zaclon acknowledges that "neither Sash nor Baghouse Dust were recycled by Zaclon in a quantity that equaled at least 75% . . . of the material present at the beginning of the year for at least six years prior to September 19, 2002." However, Zaclon asserts, using the combined turnovers of the four materials (sash, baghouse dust, stripping acid, and spent preflux), from 1999 through 2004, more than 75% of the starting inventories were recycled, except for the year 2001. Zaclon's Prehearing Exchange statement at 8-9. These materials were of the "same type," Zaclon argues, because they all have zinc as the major chemical component, and ammonia as the second highest component, and chlorides are present in each of the four materials. *Id.* at 10. The chemical form of most of the zinc or ammonia present in the materials is in the compounds $ZnCl_2$ or NH_4Cl_2. The contaminants in all of the materials are iron, lead and cadmium. *Id.* The fact that some are solid and some are liquid does not mean they are different types, just as ice and water are not different types from a regulatory standpoint. Zaclon asserts further that "Since 2002, Zaclon has recycled all of its Baghouse Dust and nearly 1,750,000 pounds of Sash," and that photographs in Complainant's Prehearing Exchange of September 21, 2000, August 22, 2001, and September 18, 2002 "clearly shows [sic] that the baghouse dust is gone and the Sash pile is greatly reduced." Zaclon's Prehearing Exchange statement at 11.

In its Motion, Complainant argues that Respondents have not denied in the Answer that the baghouse dust was a sludge or that this sludge was kept on site, unused for over ten years, or that the material on the sash pad was a by-product or that it was stored there outside for over ten years. Complainant asserts that the baghouse dust lay outside, untouched, until the bags rotted away, and that the sash pile was untouched except for a truckload carted away in 1994 as part of a failed attempt to sell it to another company. Motion at 4. Complainant bases these assertions on statements and admissions of Zaclon's officers and employees, and cites to its Prehearing Exchange Exhibits 8 and 12. Complainant points to a statement of Mr. Busovicki, the Production Manager and former Regulatory Compliance Manager for Zaclon, that Zaclon "determined that the dust contained too many impurities to be used as a raw material," Mr. Busovicki's and Mr. Krimmel's acknowledgment that the impurities in the sash made it uneconomical to recycle compared to other available sources of zinc, and Mr. Krimmel's reference to the sash as a "strategic reserve." Motion at 5; Complainant's Prehearing Exchange (CX) 8, 12.

As to the meaning of "each material of the same type" in calculating the 75 percent requirement in Section 261.1(c)(8), Complainant points out the Federal Register Notice of the Final Rule, which states "The Agency is adopting this approach to ensure that materials most alike in terms of physical characteristics and mode of recycling are counted together." 50 Fed. Reg. 614, 634 (January 4, 1985)(Respondents' Prehearing Exchange, Appendix). Complainant argues that the sash pad pile, the baghouse dust and other materials Zaclon claims to recycle are all of different physical types, generated by different processes and not of the same class, and therefore cannot be grouped together for the determination of the 75 percent threshold.

Complainant asserts, as supported by its Prehearing Exchange Exhibits 8 and 12, and Respondent's Prehearing Exchange Statement (at 10-11), that the sash materials are solids, filled with impurities such as rusted drums, drum fragments and wooden pallets, that the baghouse dust is a solid, and that the stripping acid and preflux are homogenous liquid solutions kept in sealed containers. Complainant asserts further that "[n]either the [stripping] Acid nor Preflux would appear to contain either cadmium or lead," and that they have no potential to leach such elements when they are in sealed containers. Motion at 12. Complainant compares an argument that the four materials are all the "same type" by virtue of containing zinc to an argument that a man, a mountain, an ocean and an atmosphere are all the "same type" by virtue of containing oxygen. Motion at 13. Complainant points out that, as stated in Respondents' Prehearing Exchange statement (at 6), the stripping acid has the characteristic of corrosivity and the other materials do not. Referring to the example in 40 C.F.R. § 261.1(c)(8) of "slags from a single smelting process" as the "same type," Complainant interprets "same type" as including specific by-products from a specific process within an industry, and argues that it does not cover miscellaneous by-products from the same industry, such as the entire galvanizing industry, which involves multiple distinct processes. Complainant asserts that stripping acid is from the acid strip process tanks for the crude zinc ore, spent flux is generated from a flux bath process, sash is from skimming the tops of kettles in the zinc melting process, and baghouse dust is from the air pollution control process. Motion at 16.

In its Opposition, Respondents argue that the parties disagree on whether the 75% requirement is met, especially regarding the interpretation of "each material" of the "same type" that is recycled in the "same way," and that there are critical issues of material fact in this case which preclude the granting of the Motion. Respondents urge that this is a case of first impression as to the interpretation of 40 C.F.R. § 261.1(c)(8), and that it is therefore imperative that the testimony of witnesses for both parties be heard as to the critical facts, and then the legal interpretation and the significance of the facts as to whether the regulation has been violated can be decided. Respondents state that Mr. Krimmel, professionally trained as an engineer, "will contradict and disagree with some key allegations of Complainant;" for example, he will testify that the galvanizing process comprises many operations, and that within the industry, the combination of these operations is considered to be the galvanizing process. The summary of Mr. Krimmel's testimony, in Zaclon's Prehearing Exchange statement (at 2), states that he will testify regarding the manufacturing process at Zaclon's facility, including the products Zaclon makes and the raw materials, the use of recyclable materials, and wastes that are generated. Zaclon states in the Opposition that the four materials are all primary raw materials used in the manufacture of zinc ammonium chloride, and that "Once the sash and baghouse dust are reacted with hydrochloric acid to make them a liquid, even the physical form [of the four materials] is the same." Opposition at 4. Zaclon asserts that it "will demonstrate through probative and credible evidence that these materials are chemically of the same type." *Id*. Zaclon concludes that there are fundamental facts which can only be decided upon the presentation of evidence from witnesses at a hearing." *Id*.

IV. Discussion

The initial question is whether Complainant has carried its burden of identifying the portions of the documents in the case file showing that there is no genuine issue as to any material fact. In its Motion and Proposed Findings of Fact, Complainant cited to, and quoted information from, the Answer and documents in Complainant's Prehearing Exchange, in support of the elements of the violation alleged in Count 1 of the Complaint. Complainant has identified *prima facie* evidence in its Prehearing Exchange exhibits showing that the sash and baghouse dust are hazardous wastes, and that they were accumulated speculatively at Respondents' facility for six years, from 1994 to September 19, 2002. It is undisputed that Respondents did not recycle at least 75 percent of the sash or of the baghouse dust during the time period at issue. Respondents' Prehearing Exchange statement at 7. Complainant has pointed to statements of Mr. Busovicki and Mr. Krimmel that suggest that they considered that it was not feasible to recycle the sash and baghouse dust. Complainant has pointed out the facts in the Prehearing Exchanges that indicate that the four materials (sash, baghouse dust, stripping acid and preflux) have different characteristics and therefore are not of the "same type," which shows the lack of evidence in support of Respondents' claim of meeting the 75 percent requirement. Complainant has therefore carried its initial burden on its Motion.

The next question is whether Respondents have identified "specific facts" from which a reasonable factfinder could find in its favor by a preponderance of the evidence. Specifically, as required by 40 C.F.R. § 261.1(b)(8), *"if the person accumulating [the material] can show* that the material is potentially recyclable and has a feasible means of being recycled; and that – during the calendar year (commencing on January 1) – the amount of material that is recycled, or transferred to a different site for recycling, equals at least 75 percent . . . of the amount of that material accumulated at the beginning of the period," then it is not accumulated speculatively. (emphasis added). It is Respondents' burden to come forward with evidence of these facts. The regulations provide at 40 C.F.R. § 261.2(f) as follows:

> Respondents in actions to enforce regulations implementing subtitle C of RCRA who raise a claim that a certain material is not a solid waste, or is conditionally exempt from regulation, must demonstrate that there is a known market or disposition for the material, and that they meet the terms of the exclusion or exemption. In doing so, they must provide appropriate documentation . . . to demonstrate that the material is not a waste, or is exempt from regulation.

See also, Respondents' Prehearing Exchange, Appendix, 50 Fed. Reg. at 634, 642 ("the burden of showing that sufficient amounts are being recycled is on the person accumulating the material . . . the burden of proof (in the sense of both the burden of producing evidence and the burden of persuasion) is on the persons claiming that their hazardous waste secondary material is not a waste . . . this type of claim is an affirmative defense . . . persons must keep whatever records or other means of substantiating their claims that they are not managing a solid waste . . . They also must show that they are not overaccumulating their secondary materials .").

The Respondents must prove, to meet the 75 percent requirement, that the four materials are "of the same type (*e.g.*, slags from a single smelting process)" and "recycled in the same way

(*i.e.* from which the same material is recovered or that is used in the same way)." 40 C.F.R. § 261.1(b)(8). This language was interpreted by EPA in the discussion of 40 C.F.R. § 261.1(c)(4) in the preamble to the Final Rule as follows:

> In the proposal, we left open the question of whether the overaccumulation provision applies on a material-by-material basis or on a basis that takes into account both the material being recycled and the manner of recycling. We indicated that our preference was for the 75 percent recycling requirement to be applied to all materials of the same class which were to be recycled in the same way. Most commenters agree, as this kind of accounting best insures that similarly situated materials will be grouped in the same way.
>
> We are adopting this standard in the final rule. We wish to clarify precisely what this standard means, however. By "materials of the same class" we mean materials of the same type generated from the same process. Examples of materials that would be grouped are distillation bottoms from integrated production of chlorinated aliphatic hydrocarbons, slags from a smelting process, drosses from a smelting process, dry sludges from the same process, or wastewater treatment sludges from the same process.
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> The requirement that the materials be "recycled in the same way" means that materials are . . . to be used to make the same thing . . . .
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> The Agency is adopting this approach to ensure that materials most alike in terms of physical characteristics and mode of recycling are counted together. EPA also believes this approach safeguards against situations where recyclable materials are counted along with unrecyclable ones, shielding the unrecyclable materials from being wastes. For instance, if a generator has 100 units of a secondary material all of which are recycled as ingredients in a process, and 20 units of the same material only one of which is recycled in a different process, the remaining 19 units should be classified as wastes because they aren't being recycled.

50 Fed. Reg. at 635-636.

Respondents have not shown that the 75 percent requirement was met for the six years preceding the sampling event. First, even assuming that all of the four materials are the "same type," Respondents admit in their Prehearing Exchange statement (at 9) and in their Prehearing Exchange Exhibit 9, that in the year 2001, they recycled 69.8 percent of starting inventories of the combined four materials, and thus did not meet the 75 percent requirement. The rules provide, at Section 261.1(b)(8), that a material is "accumulated speculatively" unless it is shown that "during the calendar year . . . the amount of material that is recycled . . . equals at least 75 percent" of the amount accumulated at the beginning of the year. As stated in the Federal Register preamble to 40 C.F.R. § 261.2(c)(4), the general principle behind the rule is that "hazardous secondary materials accumulating before recycling are wastes unless the person

accumulating is able to show on request that he is indeed recycling sufficient volumes of the materials *on an annual basis*." 50 Fed. Reg. at 634 (emphasis added). The EPA considered that circumstances may prevent a person in a given year from being able to recycle 75 percent or more, and therefore provided for a variance in the regulations at 40 C.F.R. § 260.30: ". . . the Administrator may determine on a case-by-case basis that the following recycled materials are not solid wastes: (a) Materials that are accumulated speculatively without sufficient amounts being recycled (as defined in § 261.1(c)(8) of this chapter) . . . " if the person submits an application for the variance in accordance with Section 260.33(a). EPA explained in the discussion of Section 261.1(c)(4) in the preamble to the Final Rule as follows:

> We also believe that there may be valid reasons that persons are unable to recycle sufficient amounts of non-waste secondary materials in one year . . . and have retained the petition process to accommodate these situations. The petition is now termed a variance from being a solid waste, and is found in § 260.30 . . . [P]rocedures for applying for . . . variances are in § 260.33. . . . A variance, if granted, would be valid for only one year.

50 Fed. Reg. at 636-637. Respondents have not asserted or shown that they applied for a variance for calendar year 2001.

Second, in their Opposition, Respondents rely on assertions, without citations to evidence, that facts are disputed as to whether the sash and baghouse dust (along with the other two materials) meet the 75 percent requirement, and state that a particular witness, Mr. Krimmel, will testify on the subject. No documents are referenced in the Opposition except the Motion and preamble to 40 C.F.R. § 261.1(c)(8). No affidavits, records substantiating the turnover rate of the sash and baghouse dust, or reports of scientific analyses are presented by Respondents. Respondents' brief description of Mr. Krimmel's proposed testimony does not establish a genuine issue of material fact.

The parties agree that the four materials are generated in different parts of galvanizing, but merely use different terms – "operations" as part of the galvanizing process, versus "processes" as part of the galvanizing industry – to describe the different parts. Even if Mr. Krimmel's interpretation or selection of terms is accepted as correct, that the four materials are generated in different parts of the same galvanizing "process," Respondents have not referred to any evidence in support of their argument that the four materials are the "same type." Respondents must show that the materials are not only "generated from the same process," but also that they are the "same type." The conclusory statements of Mr. Krimmel and the mere promise to present Mr. Krimmel's testimony at hearing are not evidence which could set forth a genuine issue of material fact as to whether the materials are "the same type generated from the same process."

The Respondents' assertion that Mr. Krimmel's testimony "will contradict and disagree with some key allegations of Complainant" and the bald promise to "demonstrate through

probative and credible evidence that these materials are of the same type" obviously do not meet the burden to designate specific facts showing that there is a genuine issue for trial by presenting affidavits or other evidence. The Motion put Respondents on notice that not only all arguments, but all *evidence* opposing the Motion, including evidence supporting affirmative defenses, must be properly presented.

Looking through Respondents' proposed evidence to see if any issues of material fact as to liability can be gleaned therein, none are found. In their Prehearing Exchange exhibits, Respondents submit a letter from OEPA dated March 24, 1987 and an inspection report of the facility, then owned by DuPont, indicating that an inspection revealed no hazardous waste violations, but it predates the violations alleged herein by about 7 years and indicates that the waste piles were eliminated, and therefore does not establish that the particular sash and baghouse dust at issue in this case were in compliance with applicable regulations. Respondent's Prehearing Exchange Exhibit (RX) 1. Respondents submit a letter and report of an OEPA inspection on January 5, 1994, regarding sludge accumulated in a roll-off container, which indicates that no hazardous waste violations were found. RX 3. Again, the inspection predates the allegations in the Complaint, and it does not appear to refer to the sash or baghouse dust.

Respondent describes RX 3 and RX 4 as field notes of Zaclon personnel regarding EPA inspections on September 21, 2001 and August 22, 2001, respectively. RX 3 notes, with regard to the "Zinc area," that "baghouse dust s/s leaking on pad" and "will look into sash pile." RX 4 notes "Sash pile and B.H. dust on east pad" with what appear to be three question marks. RX 5 is an information request letter from EPA dated March 29, 2002, and RX 6 is Zaclon's (Mr. Krimmel's) response, dated February 14, 2003. In RX 6, Mr. Krimmel asserts that the materials are not wastes and are recycled, and that the four materials (sash, baghouse dust, stripping acid and preflux) are "all materials of the same type and are recycled in the same way." RX 6 includes a list of the percentages recycled of the combined inventories of the four materials in 1999 through 2002. These conclusive assertions of Mr. Krimmel are not "evidence" as to whether the sash and baghouse dust were accumulated speculatively, and in any event, concede that in 2001 the materials did not meet the 75 percent requirement. RX 6 also states that it has recycled all of the baghouse dust and has resumed recycling of the sash, but this is not evidence relevant to the time period at issue, September 1994 to September 2002.

RX 7 is an information request letter from EPA dated November 24, 2003. RX 8 is Zaclon's (Mr. Krimmel's) January 16, 2004 response thereto, which refers to attachments containing laboratory analyses of sash and baghouse dust, stripping acid and preflux. However, these attachments are not included in Respondents' Prehearing Exchange. A chart is included in RX 8, showing the approximate average percentages of zinc, ammonia, chlorides, lead, cadmium, and iron. In the chart, sash is reported to contain 60% zinc and 9% chlorides, the baghouse dust is reported to contain 39.4% zinc and 36.2% chlorides, the stripping acid is reported to contain 17.6% zinc and 21.6% chlorides, and the preflux is reported to contain 7.8% zinc and 16.8% chlorides. The chart indicates that sash and the stripping acid were not tested for ammonia, that the preflux was not tested for lead, and that neither the sash nor the preflux were

tested for cadmium. Respondents do not identify the source of the information in the chart, and there is no indication that Respondents intend to present Mr. Krimmel as an expert to testify as to chemical analyses of the materials. Respondents have not identified him as an expert witness or submitted his resume or curriculum vitae as required for expert witnesses in the Prehearing Order dated May 26, 2005. Also, considering that the percentages vary widely among the four materials, and that the chart shows that not all of the materials were tested for each of the six substances, the chart does not constitute sufficient evidence such that a reasonable factfinder could find in Respondents' favor by a preponderance of the evidence that these materials are the "same type."

The remaining two documents are not relevant to liability. RX 10 is a letter from Zaclon to EPA discussing the proposed penalty. RX 11 includes an administrative law judge's decision from 1996 dismissing a complaint against Zaclon, Incorporated based upon EPA's failure to comply with the Paperwork Reduction Act, and, on remand, a decision in 1998 assessing a penalty for failure to submit a post-closure permit application or equivalency demonstration.

Neither Respondents' arguments in its Prehearing Exchange and Opposition, nor its statements of proposed testimony and proposed exhibits, reveal any genuine issue of material fact as to whether the sash, baghouse dust, stripping acid and preflux were the "same type," whether Respondents met the 75 percent requirement in 40 C.F.R. § 261.1(b)(8) for the six years preceding the September 19, 2002 sampling event, or whether they were accumulating speculatively the sash or baghouse dust during that period. Thus, Respondents have not raised any genuine issue as to their liability on Count 1 of the Complaint.

V. CONCLUSION

Complainant has shown that there are no genuine issues of material fact as to Respondents' liability on Count 1 of the Complaint, and that Complainant is entitled to judgment as a matter of law that Respondents stored hazardous wastes, namely sash and baghouse dust, at their facility without a permit or interim status, in violation of Section 3005(a) of RCRA, 42 U.S.C. § 6925(a), and the state regulations implementing this provision, Ohio Administrative Code 3745-50-45.

The issue of an appropriate penalty to assess for Count 1 and the issues as to liability and potential penalty as to Count 2 remain in dispute and are reserved for further proceedings.

VI. ORDER

1. Complainant's Motion for Accelerated Decision on Liability is hereby **GRANTED**. Respondents are liable for the violation alleged in Count 1 of the Complaint.

2. The parties shall continue in good faith to settle this matter. Complainant shall file a status report as to the progress of settlement efforts on or before **December 2, 2005** as previously directed in the Order dated October 7, 2005.

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Susan L. Biro
Chief Administrative Law Judge

Date: November 3, 2005
Washington, D.C.